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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1205

DAVID A. GOLDNER,
Petitioner,

v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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TABLE OF CONTENTS.

Citations to Opinions Below ---- 2

Jurisdiction ---- 2

Questions Presented ---- 3

Constitutional Provisions Involved ---- 4

Statement ---- 5

I. Preliminary Statement ---- 5

II. Facts ---- 8

A. Obtaining and Withholding Records ---- 8

B. Inability to Defend ---- 9

C. Referee's Finding of Guilt of Uncharged Offense ---- 13

Reasons for Granting the Writ ---- 16

I. Petitioner's Records Were Seized by a General and Roving Search in Violation of the Fourth and Fourteenth Amendments ---- 24

A. The Fourth Amendment exclusionary rule applies to disbarment proceedings ---- 25

B. The broad subpoena violated the Fourth Amendment ---- 31

II. The State's Retention of Petitioner's Records for the Entire Three-Year Period Prior to Trial and Throughout the Trial Denied Petitioner Due Process of Law ---- 33

III. The Finding Against Petitioner on a Charge of Which He Was Never Notified in Advance of Hearing and Against Which He Had No Opportunity to Defend Denied Petitioner Due Process of Law ---- 37

IV. Appellant Has Neither Waived Nor Acquiesced in the Violation of His Constitutional Rights ---- 40

Conclusion 42

Appendix ..... Separately Printed

TABLE OF AUTHORITIES.

Cases.

Abel v. United States, 362 U.S. 217 (1960) 27, 28

Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937) 40

Amos v. United States, 255 U.S. 313 (1921) 40

Anastoplo, In re, 366 U.S. 82 (1961) 20, 41

Azzarello v. Legal Aid Society, 117 Ohio App. 471, 185 N.E. 2d 566 (1963) 21

Boyd v. United States, 116 U.S. 616 (1886) 27, 29, 30, 32

Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964) 17, 18

Brown v. Board of Education, 347 U.S. 483 (1954) 21

Burdeau v. McDowell, 256 U.S. 465 (1921) 25

Chicago v. Lord, 3 Ill. App. 2d 410, 122 N.E. 2d 439 (1954), *affirmed* 7 Ill. 2d 379, 130 N.E. 2d 504 (1955) 28

Cohen v. Hurley, 366 U.S. 117 (1961) 19, 20, 28, 29, 30

Cohen, Re, 199 N.Y.S. 2d 658 (1960), affirmed *Cohen v. Hurley*, 366 U.S. 117 (1961) 41, 42

Cole v. Arkansas, 333 U.S. 196 (1948) 39

DeJong v. Oregon, 299 U.S. 353 (1937) 39

Dennis v. United States, 384 U.S. 855 (1966) 17

District of Columbia v. Little, 178 F. 2d 13, *affirmed on other grounds*, 339 U.S. 1 (1950) 27

Dombrowski v. Pfister, 380 U.S. 479 (1965) 18

Douglas v. California, 372 U.S. 353 (1963) 18

Elkins v. United States, 364 U.S. 206 (1960) ____25, 26
Essgee Company of China v. United States, 262 U.S. 151 (1923) ____ 32
Fahy v. Connecticut, 375 U.S. 85 (1963) ____ 38
Fay v. Noia, 372 U.S. 391 (1963) ____ 18
Fed. Trade Comm. v. American Tobacco Co., 264 U.S. 298 (1924) ____ 33
Feldman v. United States, 322 U.S. 487 (1944) ____ 30
Frank v. Maryland, 359 U.S. 360 (1959) ____ 27
Garland, Ex parte, 71 U.S. (4 Wall.) 333 (1866) ____ 20
Garrison v. Louisiana, 379 U.S. 64 (1964) ____ 21
Garrity v. New Jersey, 385 U.S. 493 (1967) ____ 40
Gault, In re, 387 U.S. 1 (1967) ____17, 18 22, 36, 39
Gideon v. Wainwright, 372 U.S. 335 (1963) ____18, 35
Gilbert v. California, 388 U.S. U.S. 263 (1967) ____ 35
Giles v. Maryland, 386 U.S. 66 (1966) ____ 17
Greene v. McElroy, 360 U.S. 474 (1959) ____34, 36, 37
Hackin v. Arizona, 389 U.S. 143 (1967) ____ 25
Hale v. Henkel, 201 U.S. 43 (1906) ____ 33
Hamilton v. Alabama, 368 U.S. 52 (1961) ____ 18
Hartman v. Hartman, 253 Wis. 389, 34 N.W. 137 (1948) ____ 28
Harris v. United States, 331 U.S. 145 (1947) ____ 32
Henry v. United States, 361 U.S. 98 (1959) ____ 32
Holt v. Virginia, 381 U.S. 131 (1965) ____ 21
Jencks v. United States, 353 U.S. 657 (1957) ____ 34
Johnson v. United States, 333 U.S. 10 (1948) ____ 40
Johnson v. Zerbst, 304 U.S. 458 (1938) ____ 40

Konigsberg v. State Bar of California, 353 U.S. 252 (1957) ---------- 19, 20, 43

Konigsberg v. State Bar of California, 366 U.S. 36 (1961) ---------- 20, 41

Lebel v. Swincicki, 354 Mich. 427, 93 N.W. 2d 281 (1958) ---------- 28

Levy, Application of, 214 F. 2d 331 (5th Cir. 1954) rev'd per curiam 348 U.S. 978 (1955) ---------- 20

Linkletter v. Walker, 381 U.S. 618 (1965) ---------- 24

Malloy v. Hogan, 378 U.S. 1 (1964) ---------- 29, 30

Mapp v. Ohio, 367 U.S. 643 (1961) ---------- 24, 25, 26, 30, 31

Marcus v. Search Warrant, 367 U.S. 717 (1961) ---------- 32

Marron v. United States, 275 U.S. 192 (1927) ---------- 32

Maryland v. Baltimore Radio Show, 338 U.S. 1912 (1950) ---------- 16

Mempa v. Rhay, 389 U.S. 128 (1967) ---------- 17

Miranda v. Arizona, 384 U.S. 436 (1966) ---------- 17

NAACP v. Button, 371 U.S. 415 (1963) ---------- 17, 18

Nelson v. United States, 208 F. 2d 505 (D. C. Cir. 1953), *cert. den.* 346 U.S. 827 (1953) ---------- 40

Ohio ex rel. Eaton v. Price, 364 U.S. 263 (1960) ---------- 27

Okla. Press Pub. Co. v. Walling, 327 U.S. 186 (1946) 33

Oliver, In re, 333 U.S. 257 (1948) ---------- 34, 36, 37

Olmstead v. United States, 277 U.S. 438 (1928) ---------- 26

Pointer v. Texas, 380 U.S. 400 (1965) ---------- 35

Powell v. Alabama, 287 U.S. 45 (1933) ---------- 35

Roviaro v. United States, 353 U.S. 53 (1957) ---------- 34

Sacher v. Ass'n. of the Bar of the City of New York, 347 U.S. 388 (1954) ---------- 20

Sackler v. Sackler, 229 N.Y.S. 2d 61 (1962) ____27, 28

Sawyer, In re, 360 U.S. 622 (1959) _____ 20

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) _____19, 20

Sheppard v. Maxwell, 384 U.S. 333 (1966) _____ 16

Sheppard v. Ohio, 352 U.S. 910 (1956) _____ 16

Spevack v. Klein, 385 U.S. 511 (1967) _____ _____7, 20, 22, 29, 30, 31, 36, 37, 39

Stanton v. Embry, 93 U.S. 548 (1876) _____ 22

Summers, In re, 325 U.S. 561 (1945) _____ 20

Taylor v. Bemis, 110 U.S. 42 (1884) _____ 22

Thompson v. Louisville, 363 U.S. 199 (1960) _____ 39

Townsend v. Sain, 372 U.S. 293 (1963) _____ 18

Turner v. Louisiana, 379 U.S. 466 (1965) _____ 36

United Mine Workers v. Illinois State Bar Ass'n., ____ U.S. ____, 88 S. Ct. 353 (1967) _____17, 18

United States v. Wade, 388 U.S. 218, 18 L. Ed. 2d 1149 (1967) _____17, 35

White v. Maryland, 373 U.S. 59 (1963) _____ 18

Williams v. United States, 282 F. 2d 940 (6th Cir. 1960) _____ 25

Willner, In re, 348 U.S. 955 (1955) _____ 16

Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) _____16, 19, 22, 36, 41

Wolf v. Colorado, 338 U.S. 25 (1949) _____24, 30

Wylie v. Cox, 20 U. S. (15 How.) 415 (1853) _____ 22

Constitutions.

Constitution of the United States:
Fourth Amendment 3, 4, 24, 25, 28, 30, 31, 32
Fifth Amendment 3, 4, 29, 30
Sixth Amendment 3, 4, 35, 37
Fourteenth Amendment 3, 4, 20, 34, 35, 36, 37

Other.

Brownell, *A Decade of Progress: Legal Aid and Defender Services,* 47 A.B.A.J. 867 (1961) 17

Cheatham, *The Supreme Court and the Profession of Law,* 14 Cath. U.L.R. 192, 197 (1965) 18

Clarlin & Howard, *Legal Representation and Class Justice,* 12 U.C.L.A. L. Rev. 381 (1965) 17

Kunstler, *The Case for Courage* (Morrow, 1962) 16

MacKinnon, *Contingent Fees in Legal Services,* 209 (1964) 22

Morgan, *A Time to Speak* (1964) 21

New Yorker, November 4, 1967, pp. 173-176 21

Pollitt, *Counsel for the Unpopular Cause,* 43 N.C.L. Rev. 11 (1964) 17, 21

Sparer, *The Role of the Welfare Client's Lawyer,* 12 U.C.L.A. L. Rev. 361 (1965) 17

Wolfram, *John Lilburne: Democracy's Pillar of Fire,* 3 Syracuse L. Rev. 213, 236 (1952) 21

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OCTOBER TERM, 1967.

No. _____.

DAVID A. GOLDNER,

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v.

EDWARD S. SILVER,
District Attorney, Kings County, State of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of New York, entered in this cause on December 7, 1967, amending the remittitur upon application for reargument. The amendment, without altering the order of permanent disbarment affirmed by that court on March 26, 1964, reads as follows:

> "Upon the hearing of the motion for reargument of the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States to wit: The appellant argued that he had been deprived of his constitutional rights in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States in each of the following respects: (1) Appellant's disbarment proceeding was constitutionally defective; (2) appellant's records were confiscated by an unconstitutional general search; (3) appellant was denied access to his records to prepare a defense and avail himself of

the effective assistance of counsel; (4) appellant was found guilty of an offense with which he had not been charged in violation of due process of law; and (5) appellant has neither waived nor acquiesced in the violation of his constitutional rights. The Court of Appeals held that there was no violation of any right guaranteed to him by the Constitution of the United States in any of the above respects."

CITATIONS TO OPINIONS BELOW.

The Report of the Special Referee is unreported and is printed in Appendix B, *infra*, pp. 4a-55a.

The memorandum opinion of the Appellate Division, printed in Appendix B, *infra*, pp. 56a-57a, is reported in 15 A.D. 2d 558, 222 N.Y.S. 2d 854 (December 27, 1961).

The order of the Court of Appeals of New York (March 26, 1964), which affirmed the order of disbarment of the Appellate Division without opinion, is printed in Appendix B, *infra*, pp. 57a-59a.

The denial of the petition for writ of certiorari by the United States Supreme Court is reported at 379 U.S. 959 (1965).

The denial of the petition for rehearing by the United States Supreme Court is reported at 380 U.S. 926 (1965).

The order of the Court of Appeals of New York (December 7, 1967) which amended the remittitur is unreported and is printed in Appendix B, *infra*, pp. 59a-60a.

JURISDICTION.

The judgment of the Court of Appeals of the State of New York was entered on December 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3), since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I. Whether seizure of all of an attorney's books, cancelled checks, cash books, ledgers, check stubs, tax returns, bank books, records of all investments and all financial records, both business and personal, for an indeterminate period pursuant to a subpoena *duces tecum* issued by a grand jury to one of a number of lawyers whose conduct was under general investigation was so broad as to constitute an illegal search within the meaning of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution.

II. Whether, after timely demand, the refusal of the state district attorney, state and federal courts and the state Judicial Inquiry to return petitioner's books and records during the three year interval between their seizure pursuant to subpoena in November, 1957 and the disciplinary hearing in December, 1960, and their failure to make all such records available to the defense during the hearing deprived petitioner of his right to prepare a defense, his right to counsel and his right to confrontation of witnesses in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

III. Whether petitioner's disbarment as a result of a finding against him in his disciplinary hearing on charges which had never been made against him prior to the hearing, and against which he had no opportunity to defend before the ruling against him, violated the Due Process clause of the Fourteenth Amendment.

IV. Whether an attorney who complies with a broad subpoena under circumstances where his failure to do so would subject him to discipline of the state bar association has waived or acquiesced in the violation of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent portions of the provisions of the United States Constitution here involved are set out below:

Amendment XIV, Section 1, Clause 2:

"* * * nor shall any State deprive any person of life, liberty, or property without due process of law * * *."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him * * * and to have the assistance of counsel for his defense."

STATEMENT.

I. PRELIMINARY STATEMENT.

Petitioner was admitted to practice law in New York in 1949. After a period of apprenticeship with another firm, he established his own office and developed an active practice in negligence cases. (H. 426-429.) [1]

This case involves an order of disbarment and related orders made by the Appellate Division, Second Judicial Department of New York, pursuant to findings and recommendations of a Special Referee appointed to conduct the disciplinary hearing in question. The disbarment proceeding grew out of a judicial inquiry ordered by the Appellate Division, Second Department, into solicitation and related practices in Kings County, New York.

As part of the Judicial Inquiry's investigation, on November 15, 1957, petitioner was served with a subpoena requiring him to produce for the Inquiry's examination his tax returns for the years 1953 through 1956, inclusive, and all of his personal and business records, tax returns, bank books, check stubs and cancelled checks for an indeterminate period of time. (SR. 118-129; Appendix A, pp. 1a-3a. Upon compulsion of disbarment for failure to cooperate with the Inquiry, petitioner complied with the terms of the broad and sweeping subpoena (SR. 32, 74, 83, 120). He testified before the Inquiry on two occasions in May and June of 1958 (SR. 33, 84). Thereafter, the Appellate Division, Second Judicial Department, ordered the District Attorney's office to proceed against the

---

[1] The transcript of the hearing before the Special Referee is referred to throughout as "H" followed by a page reference. The Report of the Special Referee is referred to as "Report." The Supplemental Record is referred to as "SR." Numerical references following "SR" are to folios unless otherwise indicated.

petitioner, and a petition charging 33 counts of misconduct was served. The matter was referred to a Special Referee, who, after a hearing, found the petitioner guilty on three of the counts contained in the petition. Petitioner was also found guilty of perjury—a charge which was nowhere contained in the petition and of which he had no notice prior to the written opinion of the Special Referee.

During the three-year hiatus between the issuance of the subpoena and the hearing, the petitioner made repeated attempts to get back his books and records. Oral and written requests for their return were made to the Presiding Justice of the Inquiry, and to the District Attorney; application for the return and suppression of such evidence was made to the federal district court and the Appellate Division, Second Judicial Department, on at least two occasions, all to no avail. (SR. 75-84; 181-183.) The federal constitutional questions involving illegal search and seizure were raised throughout these proceedings. (SR. 75-76, 77-82, 82-83.) No court order ever issued authorizing the impounding of petitioner's records. The books and papers seized were vital to the preparation and presentation of the petitioner's defense because they comprised all financial records petitioner had made during the period covered by the charges against him. Yet the Judicial Inquiry and the District Attorney's Office never returned the records. Indeed, they were admittedly used by the agents of the Judicial Inquiry to develop evidence that petitioner handled settlement payments to his clients improperly.

The Special Referee heard testimony in the proceeding against petitioner from December 1, 1960 until December 7, 1960. After the hearing, the Special Referee recommended disbarment (Report, pp. 60-61). Thereafter, several motions were made before the Appellate

Division. The District Attorney moved to confirm the Referee's Report. Petitioner opposed the motion and moved to set aside the report because the use of illegally seized evidence at the hearing "violated the constitutional guarantees against illegal and unreasonable search and seizure" and because withholding of the seized evidence from petitioner "was a deprivation of due process." (SR. 67-69.) Petitioner's motion to set aside the report was denied (SR. 61-66). Respondent's motion to confirm the report was granted and petitioner was ordered disbarred (App. B, pp. 56a-57a). The Court's memorandum opinion is reported at 15 App. Div. 2d 558, 222 N.Y.S. 2d 854. On March 26, 1964, the New York Court of Appeals affirmed the order of disbarment without opinion. (App. B, pp. 57a-59a.) On January 18, 1965, this Court denied certiorari, 379 U.S. 959. On September 9, 1967, after this Court's decision in *Spevack v. Klein*, 385 U.S. 511 (1967), petitioner filed an application in the New York Court of Appeals to reargue the appeal from the order of disbarment and related orders originally made by the Appellate Division, Second Department. On December 7, 1967, the Court of Appeals, treating petitioner's application as a motion to amend the remittitur, amended the remittitur of the Appellate Division, Second Department as follows: "Upon the hearing of the motion for reargument of the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, to wit: The appellant argued that he had been deprived of his constitutional rights in violation of the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States in each of the following respects: (1) Appellant's disbarment proceeding was constitutionally defective; (2) appellant's records were confiscated by an unconstitutional general search; (3) appel-

lant was denied access to his records to prepare a defense and avail himself of the effective assistance of counsel; (4) appellant was found guilty of an offense with which he had not been charged in violation of due process of law; and (5) appellant has neither waived nor acquiesced in the violation of his constitutional rights. The Court of Appeals held that there was no violation of any right guaranteed to him by the Constitution of the United States in any of the above respects."

It is from this order that petitioner seeks relief by petition for certiorari in this Court.

II. FACTS.

A. Obtaining and Withholding Records.

As part of the Judicial Inquiry's investigation into solicitation and related practices in Kings County, the petitioner was served on November 15, 1957 with a subpoena requiring him to produce for the Inquiry's examination all of his business and personal financial records, his day book, cash receipts books, cash disbursements book, petty cash book and vouchers, general ledger and journal, cancelled checks and bank statements, pass book and other evidences of accounts, current and closed, records of investments, and payroll records (all without limit as to time periods) and state and federal tax returns for the years 1953 through 1956. The subpoena called for both specified generic items and "any and all financial records pertaining to [his] business and/or person not itemized above." These records were taken from him on December 3, 1957 by agents of the Judicial Inquiry. The attorney representing petitioner orally requested the Judicial Inquiry counsel to return these records. On March 7, 1958 and again on March 14, 1958, this request was

made in writing. The requests were not answered, and the records were not returned. The petitioner testified before the inquiry in May and June, 1958. On October 31, 1958, the petitioner sought an order in the United States District Court for the Southern District of New York for the return of his records. This order was refused, on the ground that the application was premature because petitioner had not exhausted state remedies. The petitioner then moved before the Appellate Division, Second Department, for the return of his records on November 13, 1958, and amended his motion on November 19, 1958 to prohibit the use of these records against him. These motions were denied with leave to move before an additional Special Term of the Supreme Court. A motion made in the said Term on January 7, 1959 for the return of the records and/or their suppression was denied. The federal constitutional questions were raised throughout these proceedings.

Thereafter, the Appellate Division, Second Department, ordered the District Attorney's office to proceed against the petitioner and a petition charging misconduct was served. Petitioner attempted once more to get his records back. He wrote to the District Attorney on September 20, 1960 requesting the return of his records in order to properly prepare his defense. The records were not returned.

B. Inability to Defend.

A few examples will illustrate how completely the confiscation of petitioner's books and records handcuffed the defense at the hearing.

On direct examination of the accountant, through whom the confiscated documentary evidence was admitted and whose conclusions as an expert witness were largely

responsible for the Special Referee's findings of fact relating to subornation and perjury:

> "Q. Was there any explanation in the books as to what this $700 was for? A. May I see that check, please? Is there a check stub? *I will have to bring his check stubs over.*
>
> Q. *We have them in the office.* A. *There is nothing on here that would say.*
>
> Special Referee: You have nothing before you now in the absence of the check book itself which might possibly have a notation on the stub to give an explanation.
>
> The Witness: That is right, Your Honor * * *." (H. 220.) (Emphasis supplied.)

And on cross-examination of the same witness:

> "Q. Our records indicate that on that date you said there was a check in Dascoli—for $100 to Dr. Marcus—and you have it for $25.00. A. Is that check No. 6960?
>
> Q. *I haven't got that, I am sorry. You have all our checks and I can't tell you that.* A. *The only thing you can do * * * is mark this down and I'd have to check it. That's the only thing I can do. I haven't got it here* * **" (H. 274). (Emphasis supplied.)

Petitioner's own testimony demonstrates dramatically the handicap under which the defense was laboring. For example, on direct examination:

> "Q. What was the check in between? I notice one for $500, dated December 10, 1954, check #6782, and this one is dated December 13, 1954 for $4000, check #6784. What was the one in between? A. *I don't know, I don't have my books.* But it could have been a check in reference to the case, something, something outstanding" (H. 460a). Emphasis supplied.)

And on cross-examination of the petitioner:

"Q. * * * I show you these two checks which are now marked respectively Petitioner's Exhibits 17 and 18 in the Zucker case, one for a thousand dollars and one for $2,983.50 and point out to you that they bear the numbers respectively 5206 and 5207 and are dated—one dated March 19 and the other dated March 19—and I ask you whether or not this check numbered 5204 made to the order of James A. Citroen in the sum of $700.00 dated March 12, 1954, is in connection with the Zucker case.

The Witness: *Your Honor, I would like to see what check number 5205 which is missing, which might give me some idea of it—*

Special Referee: Do you have those records here?

Mr. DiBlasi (Assistant District Attorney): In the meantime, Judge, *maybe I can straighten it out with his own record,* if I may be permitted to ask him a question.

Special Referee: All right. 5205—is this check for twenty dollars to Dr. Abraham Cohen?

The Witness: *Yes, there's one thing else that would really help me. They have my checkbook stubs.* May I see that?

Special Referee: Go ahead, Mr. DiBlasi.

Q. Is that the check? A. Yes, but I question what case it is for * * * *This is taken from the checkbook stub. You know, those stubs that I turned in to you fellows, to the Judicial Inquiry * * * From that I could tell. Not from this. This isn't the accountant's entry* * * *

Q. Directing your attention to Petitioner's Exhibit 32, which is the check for $700.00, that was made to Citroen in payment for services rendered in connection with the Zucker case? A. *I still tell you. I don't know without looking at the checkstub book.* (H. 614-617). (Emphasis supplied.)

Further on cross-examination of the petitioner:

"Q. You wouldn't charge petty cash to a particular case in a ledger? A. No, not that I know of.

Q. And you know that. You know that to be a fact? A. I think so. As far as I know. *I'm not sure, but I haven't even looked at the books before I gave them and asked for them back. I haven't seen them in at least three years.*" (H. 602.) (Emphasis supplied.)

Further cross-examination:

"Special Referee: Didn't you say so?

The Witness: Yes. That the retainer was, as I recalled, signed in September. That's what I recall.

Q. You say a previous letter—

Mr. Gittleson: (defense counsel): *May I respectfully ask if our friend has the file. They took it away. They have it somewhere. If they have it why don't we get to the retainer?*

Mr. DiBlasi: *I have no file.* * * *

Special Referee: All right. Proceed. (H. 659.) (Emphasis supplied.)

Further, in response to inquiries regarding his checks:

"The Witness: *No, they have those. I furnished those over to the Inquiry.*

Mr. DiBlasi: *We don't have them. He turned them over to the Inquiry but they never furnished them over to us.*

Special Referee: *There is a sharp issue of fact here. This man's right to remain a member of the bar may very well be at stake* * * * (H. 731.) (Emphasis supplied.)

Finally, the following colloquy:

"Mr. Gittleson: *So that the record is straight, we made demand for the production of the original check, but due to the confusion that existed they weren't*

produced. I think they will concede that they had our checks.

Special Referee: When you say you made demand, I assume you mean on the Judicial Inquiry?

Mr. Gittleson: No, we made the demand on Mr. DiBlasi.

Special Referee: All right, is there anything else on cross?

Mr. DiBlasi: *My staff had looked for them, but weren't able to find any checks in this matter.* * * * (H. 780-781.) (Emphasis supplied.)

C. Referee's Finding of Guilt of Uncharged Offense.

The Referee dismissed all but three of the thirty-three (33) charges made against petitioner. In addition, the Special Referee found the petitioner guilty of perjury—a charge which was nowhere contained in the petition and of which petitioner had no notice prior to the written opinion of the Special Referee.

His crucial findings were as follows (Report, pp. 60-61):

> 1. That the Respondent failed to provide clients in some instances 'with statements relative to the settlement and disposition of their cases' as required by Rule 4-B of the Rules of the Appellate Division, First Department. (Charge 7-v. * * *)
>
> 2. That 'Respondent divided fees for legal services with persons other than lawyers for services rendered by such persons in the settlement of legal claims or suits in violation of Canon 34,' to wit, with one James Citroen. (Charge 7-z. * * *)
>
> 3. That 'Respondent wilfully procured and induced clients and witnesses' specifically Dominic Dascoli and Gilbert Zucker 'to testify falsely on hearings being conducted by an additional Special Term of the Supreme Court into the conduct of attorneys

and others' and more specifically 'that Respondent told them to state that they had received the proceeds of certain checks issued in their respective names when, in truth, they had not.' (Charge 7-aa. * * *) and

4. That Respondent committed perjury before me in his testimony with reference to the so-called 'yellow sheets' and the alleged retention by his various clients of the proceeds of the 'smaller' checks herein dealt with by reason of which he is unfit to remain a member of the profession of the law.

I should add that if Items 1 and 2 above were alone involved I would recommend that the punishment to be imposed upon the Respondent be a severe censure.

The crucial findings of the Referee are numbers 3 and 4 and his reasoning behind them is set forth at pages 54-57 of his Report. App. B, pp. 49a-53a. Briefly it was as follows:

The Referee found both that Dascoli and Zucker testified before the Inquiry that they kept the small checks and that, in fact, they had not. Since, under this theory, both had lied, the Referee correctly sought corroboration of the charge that their perjury before the Inquiry had been suborned. He stated (Report, p. 56)[2] that petitioner himself had supplied such corroboration. This asserted corroboration was petitioner's introduction into evidence of the yellow sheets which, petitioner testified, he had shown his clients. The Referee found

"the yellow sheets to have been fabricated to frustrate discovery of the truth as to where the smaller checks and their proceeds had gone * * *." (H. 57.)

The Referee said that this fabrication was "to avoid a visitation of justice for the subornation" and that this

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[2] App. B, pp. 51a-52a.

"evinced consciousness of (petitioner's) guilt of that crime." (H. 56.) The Referee said this, even though petitioner had testified before the Inquiry concerning the yellow sheets long before Dascoli and Zucker had given their allegedly perjured testimony. Thus, Zucker appeared before the Inquiry on November 14, 1958 (H. 287), whereas petitioner testified about the yellow sheets in May and June, 1958 (SR. 33).

The Referee gave four reasons for his finding that the sheets were fabricated:

(1) No sheet was used in the cross-examination by petitioner's counsel of the client to whose case it referred (Report, p. 56).

(2) The ledger entries, according to the Referee, showed that the expenses with respect to a given case had been taken from the total settlement figure or "from the top" before distribution; but the yellow sheets indicated that the expenses were taken from the clients' share and, in view of the Referee, included items not appearing in the ledger (Report, pp. 56-57).

(3) According to the Referee, there was a "more-than-coincidence" in the fact that the clients' share minus the total expenses equalled the amount of the primary check in the cases of both Dascoli and Zucker (*ibid.*), although it is not altogether clear what the Referee is saying here.

(4) It was "most singular," according to the Referee, that respondent did not buttress his testimony by producing all the yellow sheets he had ever prepared during the period in question (*ibid*).

REASONS FOR GRANTING THE WRIT.

Petitioner was permanently disbarred from the practice of his profession as a lawyer more than six years ago. He has been seeking a new hearing ever since, upon the ground that the state disciplinary proceeding against him was fundamentally unfair and denied him the protections of due process of law.

This is his second attempt to obtain relief from this Court. While it is clear that denial of certiorari carries no substantive implications,[3] and that a case once denied review here is not thereby precluded from subsequent review on the merits,[4] it is perhaps pertinent to note that, in the interim since petitioner last knocked on its door, this Court's decisions have reflected both dramatic social changes in our national scene and the shifting winds of constitutional doctrine—a movement of events and legal philosophy which make this application for relief even more compelling than the last, more than three years ago.

It is apparent that the dynamic and pressing demands of the poor, the disenfranchised, the racial minorities, for their proportionate share of the economic product of an affluent society and the fulfillment of the long-denied constitutional promise of freedom and justice and equality *in fact,* have challenged the lawyer—long a central figure in the struggle for social and legal reform[5]—to perform a

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[3] See, e.g., *Sheppard v. Ohio,* 352 U.S. 910, 911 (1956) and *Maryland v. Baltimore Radio Show,* 338 U.S. 1912 (1950).

[4] Cf. *Sheppard v. Ohio,* 352 U.S. 910, 911 (1956) (denial of certiorari); certiorari subsequently granted and decision below reversed sub nom *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *In re Willner,* 348 U.S. 955 (1955) (denial of certiorari); certiorari subsequently granted and decision below reversed sub nom *Willner v. Committee on Character and Fitness,* 373 U.S. 96 (1963).

[5] See collected case studies in Kunstler, *The Case for Courage* (Morrow, 1962).

more demanding function than history has ever before called upon him to assume. The full story of the heartbreaking efforts of lawyers in the South and riot-ridden urban centers in the North to provide effective representation of their Negro and civil rights activist clients in a hostile setting has yet to be written;[6] the dynamic growth of legal aid and public defender services for the indigent, funded by private and governmental sources, carries implications for society and the legal profession which serves it which cannot yet be fully understood.[7]

It is also apparent that, as a means of meeting the social crises which have become commonplace throughout the nation, this Court has, by its own decisions, greatly expanded and redefined the role of the lawyer as advocate in both the criminal[8] and civil[9] spheres. By placing the defense lawyer in the police interrogation room[10] and at the identification lineup in the jailhouse[11] as witness as well as counsel, by giving him weapons of discovery never before available to the defense,[12] by making his effective

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[6] See, e.g., Pollitt, *Counsel for the Unpopular Cause*, 43 N.C.L. Rev. 11 (1964).

[7] See, e.g., Brownell, *A Decade of Progress; Legal Aid and Defender Services*, 47 A.B.A.J. 867 (1961); Sparer, *The Role of the Welfare Client's Lawyer*, 12 U.C.L.A. L. Rev. 361 (1965); Clarlin & Howard, *Legal Representation and Class Justice*, 12 U.C.L.A. L. Rev. 381 (1965).

[8] E.g., *United States v. Wade*, 388 U.S. 218 (1967); *Mempa v. Rhay*, 389 U.S. 128 (1967).

[9] *United Mine Workers v. Illinois State Bar Ass'n.*, ____ U.S. ____, 88 S.Ct. 353 (1967); *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963); *In re Gault*, 387 U.S. 1 (1967).

[10] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[11] *United States v. Wade*, 388 U.S. 218 (1967).

[12] *Dennis v. United States*, 384 U.S. 855 (1966); *Giles v. Maryland*, 386 U.S. 66 (1966).

participation in criminal [13] and juvenile [14] trials at early stages [15] and upon appeal [16] a matter of constitutional urgency, by providing effective procedures for post-conviction constitutional attack upon criminal convictions [17] and for pre-conviction constitutional attack upon state laws,[18] this Court has placed in the hands of the lawyer the means of, as well as the prime responsibility for, guarding the constitutional rights of all accused of crime by state and federal government—children as well as adults, black as well as white, the poor as well as those who can pay for legal assistance.

Moreover, this Court has apparently recognized that its opening of procedural doors heretofore closed to the individual lawyer has not only cast him in the sweeping and challenging role of principal defender of all constitutional and legal rights in our society, but has imposed vast burdens of execution upon him as well. For, in order to allow him to be both creative and effective in his newly expanded role,[19] it has loosened some of the traditional strictures against group legal practice and sanctioned his professional activity in defense of both public [20] and private [21] rights in a group setting.

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[13] *Gideon v. Wainwright*, 372 U.S. 335 (1963).

[14] *In re Gault*, 387 U.S. 1 (1967).

[15] *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963).

[16] *Douglas v. California*, 372 U.S. 353 (1963).

[17] *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

[18] *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

[19] See Cheatham, *The Supreme Court and the Profession of Law*, 14 Cath. U.L.R. 192, 197 (1965).

[20] *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963).

[21] *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964); *United Mine Workers v. Illinois State Bar Ass'n*, ---- U.S. ----, 88 S. Ct. 353 (1967).

It has been frequently observed that, in order to perform their highest function "both to society and the bar itself * * * lawyers [must] be unintimidated—free to think, speak and act as members of an Independent Bar." [22] For, "one of the great purposes underlying the grant of [the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power] was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer * * * has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people." [23]

In recognition of societal need for the independence of the bar as well as the personal tragedy to the affected lawyer, this Court has upon a number of occasions made it clear that while admissions to the bar and discipline of its members are matters of state concern, arbitrary state action which denies a lawyer permission to practice law violates the Due Process Clause of the Fourteenth Amendment.[24] But the matter does not end there. For in the cases in which this Court has reviewed state admission or

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[22] *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957).

[23] *Cohen v. Hurley*, 366 U.S. 117, 138-139 (1961) (Black, J., dissenting).

[24] *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239 (1957); *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957); *Cohen v. Hurley*, 366 U.S. 117 (1961); *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

disbarment proceedings,[25] "[t]he issue is not * * * *whether* lawyers are entitled to due process of law * * * but, rather, *what* process is constitutionally due them in such circumstances." [26] That the answer given in each case reflects irreconcilable disagreement among the members of a gravely divided Court as to the *scope* and *quality* of due process to which lawyers are entitled is not open to serious question.[27]

The lawyer today is entitled to greater protection from the Due Process Clause of the Fourteenth Amendment than the State of New York has afforded this petitioner. For as he moves into legal fields from which he has previously been excluded, as he represents people who have never before had legal representation of any kind, as his relationship with institutions and his clients undergoes extensive metamorphosis and his professional image of himself and his duties are broadened to meet the needs of a changing society and the express command of this Court, the independent lawyer's vulnerability to arbitrary retaliation against him by the governmental and private institutions he must oppose if he is to fulfill his designated function will increase in direct proportion to his success.

The onslaught has already begun. Lawyers facing the hostility of Southern courts in trials in which race is in issue have been sharply exposed to the "hazard of being

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[25] Denial of admission to the bar and disbarment are equivalent for constitutional purposes. *Cohen v. Hurley*, 366 U.S. 117, 123 (1961).

[26] *Id.* at 129.

[27] Cf. *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 (1957) and *Konigsberg v. State Bar*, 353 U.S. 252 (1957) with *In re Anastoplo*, 366 U.S. 82 (1961) and *Konigsberg v. State Bar*, 366 U.S. 36 (1961); cf. *Cohen v. Hurley*, 366 U.S. 117 (1961) with *Spevack v. Klein*, 385 U.S. 511 (1967); and see *In re Sawyer*, 360 U.S. 622 (1959); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Sacher v. Ass'n. of the Bar of the City of New York*, 347 U.S. 388 (1954); *Application of Levy*, 214 F. 2d 331 (5th Cir. 1954) rev'd per curiam 348 U.S. 978 (1955); *In re Summers*, 325 U.S. 561 (1945).

undone."[28] Contempt charges by courts,[29] disciplinary proceedings brought by local bar associations[30] and public pressure[31] have been techniques employed to neutralize effective counsel and thereby frustrate the implementation of the promise of *Brown v. Board of Education*.[32] Public Defender and Legal Aid programs have been attacked by bar associations as illegal practice of law by corporations.[33] The Office of Economic Opportunity-supported California Rural Legal Assistance program is under heavy attack by the Governor of California who charges its lawyers with "actively and unethically promoting litigation" and its organization as a "promoter of social causes"[34] and by elements in Congress who recently introduced two amendments to the federal anti-poverty bill to dilute the effectiveness of its legal program as a social force.[35]

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Petitioner during the twelve-year period of his practice of law in New York was neither a heroic nor a

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[28] It is reported that when John Lilburne was tried for treason in Cromwell's England, he asked that counsel be appointed to defend him because "no eminent experienced lawyer dare well meddle with my business, no, nor so much as bestow a visit upon me, but he runs a hazard of being undone." Wolfram, *John Lilburne: Democracy's Pillar of Fire*, 3 Syracuse L. Rev. 213, 236 (1952).

[29] E.g., *Holt v. Virginia*, 381 U. S. 131 (1965); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

[30] See cases reported in Pollitt, *Counsel for the Unpopular Cause*, 43 North Carolina L. Rev. 11, 12-17 (1964).

[31] See Morgan, *A Time to Speak* (1964).

[32] 347 U.S. 483 (1954).

[33] E.g., *Azzarello v. Legal Aid Society*, 117 Ohio App. 471, 185 N.E. 2d 566 (1963).

[34] New Yorker, November 4, 1967, pp. 173-176.

[35] The amendments would have prevented any OEO-financed legal service in the country from bringing suit against a local, state or federal agency and would have required approval of the local bar association before any such legal service could begin operation. Both amendments were unsuccessful. Time, December 15, 1967, p. 75.

prestigious figure. He represented no powerful clients nor was he associated with a blue-chip law firm. He was a single practitioner, who earned his livelihood as a trial lawyer representing persons who had been injured and who sought recovery on grounds of negligence for their losses. He was paid for his services by contingent fee arrangements [36] with his clients. But for his tragic disbarment and his dogged efforts over the past six years to obtain a rehearing of the charges against him so that he might vindicate himself, his career would in all probability have remained unremarkable. But against the backdrop of two of this Court's recently decided cases, *Spevack v. Klein* [37] and *In re Gault*,[38] the personal tragedy of petitioner's disbarment presents a suitable record and a timely opportunity for this Court to serve notice upon all state bar authorities that high standards of procedural due process are constitutionally compelled in all disciplinary proceedings against lawyers,[39] to articulate clearly the *content* of such standards, and thereby provide the necessary support for a profession in flux trying to meet the needs of a society in flux.

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[36] It is of more than passing interest to note that this Court early approved of contingent fees. *Wylie v. Cox*, 20 U. S. (15 How.) 415 (1853); *Stanton v. Embry*, 93 U.S. 548 (1876); *Taylor v. Bemis*, 110 U.S. 42 (1884). Until the recent expansion of legal aid services and public defender programs, they represented the only means by which non-affluent claimants could afford to retain counsel to represent them on roughly equal terms with retained counsel of institutional defendants. See MacKinnon, *Contingent Fees in Legal Services*, 209 (1964).

[37] 385 U.S. 511 (1967).

[38] 387 U.S. 1 (1967).

[39] It is true that *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), appears to hold that procedural due process requirements are essential in state bar admission cases. But the "messy and opaque record" (See Harlan, J. dissenting, *id.* at 109) and the plurality opinions do not make clear the essential minimum content of the right of confrontation or notice in the setting of a formal disciplinary hearing. Nor are Fourth Amendment issues, urged here, raised at all.

Petitioner does not deny the state's right and duty to discipline attorneys—including himself—upon proof of professional wrongdoing. But as a precondition to such disciplinary action, it must be demonstrated that a finding of such professional wrongdoing followed a full and fair hearing at which the attorney charged had an adequate opportunity to defend himself. Such a hearing has never been given to petitioner by the State of New York.

The state court of last resort in New York has again considered the claims of constitutional infirmity in the proceedings which resulted in petitioner's permanent disbarment and has denied all of them on the merits. The vastly important question of whether the State of New York will be permitted to disbar lawyers upon the basis of such a constitutionally defective record is once again squarely presented to this Court—this time under the altered constitutional circumstances and social experience described above which juxtapose public necessity and private redress in a fashion which entitles petitioner's claims to consideration on their merits by this Court.

It is petitioner's contention that his disbarment proceeding was constitutionally defective because (I) the subpoena by which all of his business and personal records were confiscated was unconstitutionally broad; (II) the refusal of the state to return to him or allow him access to his records either during the three-year period between their seizure and his trial, or at his trial, despite timely and persistent demand therefor, unconstitutionally deprived him of the opportunity to make adequate defense; (III) the disbarment resulting from an adverse finding against him on charges never made prior to the hearing and against which he had no opportunity to defend before the ruling against him was a denial of due process of law to which he was entitled; and (IV) he neither waived nor

acquiesced in any of the constitutional violations of which he complains.

I.

PETITIONER'S RECORDS WERE SEIZED BY A GENERAL AND ROVING SEARCH IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

As a part of its general investigation of misconduct of many lawyers within its jurisdiction, the Judicial Inquiry served upon petitioner a subpoena *duces tecum* of unbelievable breadth. Pursuant to its terms, petitioner was required to surrender to agents of the State of New York all of his business records, all of his personal records, all banking records for business and personal accounts whether open or closed, all records of private investments, tax records and returns—both specified items and "any and all financial records pertaining to [his] business and/or person not itemized above" covering petitioner's activities over an unspecified period of time.[40]

Petitioner contends that the broad subpoena pursuant to which his records were produced for examination by the Judicial Inquiry was an unlawfully broad general and roving search expressly condemned by the Fourth Amendment, applicable to state proceedings through the Due Process Clause of the Fourteenth,[41] and that the evidence so acquired by the State of New York was constitutionally inadmissible in evidence against petitioner.[42]

This contention requires a determination by this Court that (A) the Fourth Amendment exclusionary rule

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[40] App. A, pp. 1a-3a.

[41] *Wolf v. Colorado*, 338 U.S. 25 (1949).

[42] *Mapp v. Ohio*, 367 U.S. 643 (1961). There is no question about the applicability of *Mapp* to the present proceeding so far as timeliness is concerned. No retroactive problem arises because *Mapp* was decided before petitioner had exhausted his appellate remedies on direct appeal. See *Linkletter v. Walker*, 381 U.S. 618 (1965).

applies to state disbarment proceedings as well as to criminal prosecutions, and (B) the breadth of the subpoena violated the Fourth Amendment requirement of particularity and reasonableness. Each of these conclusions will be considered below.

A. The Fourth Amendment exclusionary rule applies to disbarment proceedings.

There are particularly compelling reasons why lawyers are at least as entitled to Fourth Amendment protections against invasions of their privacy as are any other citizens. If state law enforcement authorities can, with constitutional impunity, rummage indiscriminately and at will through all of the private papers of lawyers, the threat or the fact[43] will necessarily diminish their verve, effectiveness, and independence in the vigorous defense of their clients' rights against those same authorities.

The traditional response that the Fourth Amendment exclusionary rule can be applied only in criminal cases will not bear analysis. The policy reasons behind the exclusionary rule require the extension of its application to *non-criminal* cases in which the government, federal or state, has had a hand in obtaining the tainted evidence which is sought to be excluded.[44]

What are the policy reasons behind the holding in *Mapp v. Ohio* that the rule of exclusion is a constitutional

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[43] *Hackin v. Arizona*, 389 U.S. 143 (1967) (dissenting opinion).

[44] Petitioner is not now urging that evidence illegally obtained by a private person is subject to the operation of the exclusionary rule, although a cogent case can be made to demonstrate the implicit undercutting of the basis of *Burdeau v. McDowell*, 256 U.S. 465 (1921), which so held, by *Elkins v. United States*, 364 U.S. 206 (1960) (tainted evidence procured by persons not restrained by the command of the Fourth Amendment but turned over to government agents who are so restrained, held: properly excluded). See dictum in *Williams v. United States*, 282 F. 2d 940, 941 (6th Cir. 1960).

command rather than a mere rule of evidence to be adopted or rejected by each sovereign state at will? It seems clear from the language of the Court in *Mapp* that there were at least three reasons, intertwined to be sure, for so holding: *First,* to demonstrate dramatically and effectively the important place occupied by the right of privacy in our constitutional scheme of freedom;[45] *Second,* to preserve to the government and the courts "that judicial integrity so necessary in the true administration of justice";[46] and *Third,* "to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it."[47] Petitioner urges that all of these reasons—dramatic, moral and practical—are at least as operative in non-criminal litigation as in criminal proceedings. For, while non-criminal administrative proceedings are important, "they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers and other crimi-

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[45] "Were it otherwise, then just as without the Weeks rule [of exclusion in federal cases] the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty'" *Mapp v. Ohio,* 367 U.S. 643, 655 (1961).

[46] *Mapp v. Ohio,* 367 U.S. 643, 660 (1961) and see Mr. Justice Brandeis, dissenting in *Olmstead v. United States,* 277 U.S. 438, 485 (1928):

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example * * * If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (quoted with approval in *Mapp,* at page 659.)

[47] *Elkins v. United States,* 364 U.S. 206, 217 (1960), quoted with approval in *Mapp* at page 656.

nal elements"[48] where the exclusionary rule admittedly operates. "It would seem that the public interest in protecting privacy is equally as great in one case as in another."[49]

Boyd v. United States, 116 U.S. 616 (1886), which established the rule that use of illegally obtained evidence invalidates the entire legal proceedings in which it is used and which was the point of origin of the long history of the *Mapp* doctrine, was itself a non-criminal administrative proceeding. Moreover, the principles involving the law of search and seizure and the exclusionary rule have been applied by this Court in other cases involving administrative proceedings. Cf. *Abel v. United States,* 362 U.S. 217 (1960); *Ohio ex rel. Eaton v. Price,* 364 U.S. 263 (1960); *Frank v. Maryland,* 359 U.S. 360 (1959); *District of Columbia v. Little,* 178 F. 2d 13, *affirmed on other grounds,* 339 U.S. 1 (1950).

As Christ, *J.*, dissenting in *Sackler v. Sackler,* 229 N.Y.S. 2d 61, 65 (1962)[50] has pointed out, the exclusionary rule

> "gives new vitality to the claim for exclusion of tainted evidence in all lawsuits, civil as well as criminal. It is a strange concept which would permit a court of law to encourage the commission of illegal acts by honoring the fruits of the illegality, and which would permit the perpetrator to win a lawsuit by deliberately violating the law.

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[48] *Frank v. Maryland,* 359 U.S. 360, 374 (1959) (dissenting opinion).

[49] *Ibid.*

[50] Although respondent has attempted in the courts below to support his position that the exclusionary rule is not applicable to civil cases by citing *Sackler,* a careful reading of the holding demonstrates that it is confined to the issue of tainted evidence procured by *private persons,* an issue not raised here.

> "It would be a still greater anomaly to bar tainted evidence in a criminal case but at the same time permit its introduction in a civil suit. There is no sound reason for a different rule of admissibility between civil and criminal cases. It should be the same in both. Evidence obtained by the deliberate commission of a crime should be inadmissible on behalf of the perpetrator in the trial of a civil action." [51]

Nor is this a radical departure from history. For it must be noted that "the Fourth Amendment in origin had to do as much with ferreting out heretics and collecting taxes as with enforcement of the criminal laws." [52]

Moreover, the argument which was the essence of *Cohen v. Hurley*[53]—that constitutional standards must be relaxed in disciplinary cases against lawyers because of the overriding interest of the States in policing the conduct of the bar—is no longer available.

Several recent pronouncements by this Court support the contention that undiluted Fourth Amendment commands regarding search and seizure must be applied, not only in criminal cases, but also in disbarment hearings which are civil in form but criminal in consequence.

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[51] Or, as Judge Hopkins has stated the point:

> "It is anomalous to enforce opposite rules concerning evidence blighted by the same pollution. The unlawful search violates the identical privacy whether its fruits are used to convict in a criminal prosecution, or to forfeit a personal right in a divorce action." *Sackler v. Sackler*, 229 N.Y.S. 2d 61, 66 (1962) (dissenting opinion). See also *Lebel v. Swincicki*, 354 Mich. 427, 93 N.W. 2d 281 (1958); *Chicago v. Lord*, 3 Ill. App. 2d 410, 122 N.E. 2d 439 (1954), *affirmed* 7 Ill. 2d 379, 130 N.E. 2d 504 (1955); Cf. *Hartman v. Hartman*, 253 Wis. 389, 34 N.W. 137 (1948).

[52] *Abel v. United States*, 362 U.S. 217, 242 (1960) (dissenting opinion).

[53] 366 U.S. 117 (1961).

In *Spevack v. Klein*,[54] this Court has recently re-examined its earlier decision of *Cohen v. Hurley*,[55] in which it had held that, so far as the Fifth Amendment privilege against self-incrimination was concerned, a state in its disbarment proceedings was *not* bound to the high constitutional standards imposed upon criminal prosecutions.[56] The *Spevack* Court rejected the *Cohen* philosophy absolutely, adopted its dissenting opinions as controlling law and noted that the Fifth Amendment "extends its protections to lawyers as well as to other individuals."[57] The touchstone of the reversal of *Cohen* was that since the announcement of that decision, this Court had specifically held in *Malloy v. Hogan*[58] that the Fifth Amendment privilege against self-incrimination, as interpreted by this Court, had been absorbed in the Fourteenth as a command upon the states in their criminal prosecutions and that, as a consequence, the states were no longer free to "water down" their own self-incrimination prohibitions to exclude lawyers from the mantle of such protection.[59]

Noting that a " 'penalty' is not restricted to fine or imprisonment,"[60] this Court observed that its decision to compel strict state adherence to Fifth Amendment requirements was "in the tradition of the broad protection given the privilege at least since *Boyd v. United States*,[61] * * * where compulsory production of books and papers

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[54] 385 U.S. 511 (1967).

[55] 366 U.S. 117 (1961).

[56] *Id.* at 131.

[57] 385 U.S. 511, 513 (1967).

[58] 378 U.S. 1 (1964).

[59] 385 U.S. 511, 514-515 (1967).

[60] *Id.* at 515.

[61] 116 U.S. 616 (1886).

of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself." [62]

Spevack's reaffirmation of the availability of Fifth Amendment protections to lawyers under disciplinary attack compels the extension of Fourth Amendment guarantees to lawyers as well. For the "security of one's privacy against arbitrary [state] intrusion" guaranteed by the Fourth Amendment has long since been held to be "implicit in the concept of ordered liberty." [63] The close connection between Fourth and Fifth Amendment protections and their relationship to individual privacy and security against governmental invasion has long been an important consideration of this Court in interpreting the scope of both.[64] The Fourth and Fifth Amendments express "supplementing phases of the same constitutional purpose —to maintain inviolate large areas of personal privacy." [65] Considering the inseverability of these protections in the context of state disciplinary proceedings against lawyers, it is chilling to note in Mr. Justice Black's dissenting opinion in *Cohen v. Hurley*,[66] now the law of the land, his unerring prediction of the very facts of the instant case as a consequence of the majority's Fifth Amendment determination in that case:

> "It is, of course, possible that the majority will allow this process to go no further—that it will not disturb the few remaining constitutional safeguards of the lawyer's independence. But I find no such

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[62] 385 U.S. 511, 515 (1967).

[63] *Wolf v. Colorado*, 338 U.S. 25 (1949).

[64] *Boyd v. United States*, 116 U.S. 616 (1886); and see historical account in *Mapp v. Ohio*, 367 U.S. 643, 646-647 (1961); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

[65] *Feldman v. United States*, 322 U.S. 487, 489-490 (1944), quoted with approval in *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

[66] 366 U.S. 117, 141-143 (1961).

promise in the majority's opinion. On the contrary, I find in that opinion a willingness to give overriding effect to the lawyer's duty of 'cooperation,' even to the destruction of constitutional safeguards and I cannot know how many constitutional safeguards would be sacrificed to this doctrine. *Could a lawyer who refused to 'cooperate' now be subjected to an unlawful search in an attempt to find evidence that he is guilty of something that a judge might later find to constitute 'shady practices'?*" (Emphasis supplied.)

The case at bar represents the materialization of Mr. Justice Black's concern. Fortunately, the decision in *Spevack* demonstrates that at least a majority of this Court shares that concern. Petitioner is now impelled to ask, as this Court has itself asked in a somewhat different but analogous context:

> "This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government * * * the right not to be convicted by use of a coerced confession * * *. *Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc.?*" [67] (Emphasis supplied.)

B. The broad subpoena violated the Fourth Amendment.

Assuming the applicability of the Fourth Amendment exclusionary rule to state disbarment proceedings, there remains for consideration the question of whether the broad subpoena *duces tecum* by which the State of New York acquired all of petitioner's books and records constituted an illegal search and seizure in violation of the Fourth and Fourteenth Amendments.

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[67] *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

While a great many of the cases which have delineated the law of search and seizure have been cases involving forcible physical searches by policemen, either with or without judicial warrants, it cannot at this late date be denied that compulsory production of private papers by legal process is equivalent to, and treated for constitutional purposes as, a search and seizure. *Boyd v. United States,* 116 U.S. 616 (1886); *Essgee Company of China v. United States,* 262 U.S. 151 (1923). Similar treatment is afforded such compulsory production by subpoenae *duces tecum. Essgee Company of China v. United States, supra.* And the fact that the papers whose production is thus compelled belong to an individual rather than a corporation requires the particularly unrestricted application of the protections of the Fourth and Fifth Amendments. *Essgee Company of China v. United States, supra.*

The Fourth Amendment expressly prohibits searches without warrants "*particularly describing the place to be searched,* and the *persons or things to be seized.*" This language has its roots in this country's origins. The founders were all too acutely aware of the evils of the general warrant and the writs of assistance.[68]

As a consequence of this historical development, the explicit command of the Fourth Amendment and the imperatives of a free society, this Court has frequently and resolutely set its face against general or roving searches. *Marcus v. Search Warrant,* 367 U.S. 717 (1961). See also Justice Butler's strong language in *Marron v. United States,* 275 U.S. 192, 195-196 (1927):

> "General searches have long been deemed to violate fundamental rights. It is plain that the [Fourth] Amendment forbids them * * *.

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[68] For a historical account, see *Henry v. United States,* 361 U.S. 98, 100-101 (1959) and *Harris v. United States,* 331 U.S. 145, 157-163 (1947) (dissenting opinion).

"The requirement that warrants shall particularly describe the thing to be seized makes general searches under them impossible * * *."

As a consequence of these concerns, an order for the production of records is constitutionally defective if it is too sweeping,[69] if the information sought is not relevant to any lawful inquiry,[70] or if it represents a "fishing expedition" in search of evidence of crime.[71]

In the instant case, the Judicial Inquiry used a broad subpoena *duces tecum* as a dragnet to ensnare all of petitioner's business and personal records for an indeterminate period, without regard to possible relevance to the subject of the investigation, and to sift out at its leisure the tasty and incriminating morsels of evidence it had trapped. Never has there been such a classic example of a general and roving search, nor such a pristine demonstration of the patent unfairness of such a procedure.

II.

THE STATE'S RETENTION OF PETITIONER'S RECORDS FOR THE ENTIRE THREE YEAR PERIOD PRIOR TO TRIAL AND THROUGHOUT THE TRIAL DENIED PETITIONER DUE PROCESS OF LAW.

Quite apart from the illegal search and seizure of evidence discussed in Argument I above, petitioner contends that the refusal of the prosecutory and judiciary organs of the State of New York to return petitioner's private papers to him, after timely demand, during the three-year interval between the time they were originally subpoenaed in November, 1957 and the disciplinary hearing in Decem-

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[69] *Hale v. Henkel*, 201 U.S. 43, 76 (1906).

[70] *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946).

[71] *Fed. Trade Comm. v. American Tobacco Co.*, 264 U.S. 298, 305-306 (1924).

ber, 1960, and during the entire hearing, was a denial of due process of law under the Fourteenth Amendment which independently invalidates the proceedings below.

It is too late in the day to deny that a person charged with an act which involves either punishment or forfeiture must, as a matter of due process, have an opportunity to prepare and be heard in his own defense. *In re Oliver*, 333 U.S. 257 (1948). As a part of the preparation of a defense, the right to discover and inspect documents, even those which result from the work-product of the adverse party, is a matter of grave importance. *Roviaro v. United States*, 353 U.S. 53 (1957); *Jencks v. United States*, 353 U.S. 657 (1957).

And the right to an opportunity to prepare a defense obtains in non-criminal administrative proceedings as well as in criminal cases. *Greene v. McElroy*, 360 U.S. 474 (1959).

But a more compelling case for full disclosure than the case at bar can hardly be imagined; for here all the petitioner sought was the return of *his own private papers* so that he might prepare a defense against the charges based upon these documents. And for three years petitioner was met with consistent and arbitrary judiciary and administrative refusal to comply with this most basic and proper request. If, in response to an accusation, the right to prepare a defense has any meaning at all, this case requires reversal.

Moreover, the inaccessibility of these business records to petitioner's counsel for the three years immediately prior to petitioner's disciplinary hearing, and throughout the hearing itself, quite clearly impaired his effectiveness as counsel. A case based upon petitioner's business records in which the prosecution's star witness was an accountant making computations from, and interpretations

of, records to which the defense was denied access, in which the prosecution introduced those items of evidence which furthered its theory of the case and conveniently lost or mislaid those documents which might have exculpated the petitioner, demonstrates, without more, that the unavailability of these records emasculated defense counsel in his efforts to prepare a defense to the disciplinary charges against petitioner.

Since the *effective* assistance of counsel is fundamental to Sixth Amendment compliance, *Powell v. Alabama*, 287 U.S. 45 (1933), and such Sixth Amendment requirement is a command upon state authorities by the Due Process Clause of the Fourteenth, *Gideon v. Wainwright*, 372 U.S. 335 (1963), petitioner is entitled to relief upon this ground as well as upon general due process considerations.

Moreover, the Sixth Amendment right to *effective* confrontation of adverse witnesses, guaranteed as a matter of fundamental due process by *Pointer v. Texas*, 380 U.S. 400 (1965), and the petitioner's right "*meaningfully* to cross-examine the witness against him," *United States v. Wade*, 388 U.S. 218, 18 L. Ed. 2d 1149, 1157 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), have been denied petitioner as well. How does one effectively cross-examine the prosecution's expert witness-accountant to show that he has made erroneous computations or interpretations of financial records—interpretations which are categorically denied by the accused—when neither counsel nor the accused has had access to such records for more than three years, and none of the records about which the accountant has testified are accessible to the defense in the courtroom for use during cross-examination?

There remains for consideration the question of whether the Sixth Amendment rights of effective counsel

and effective confrontation, recently held to be fundamental and essential to a fair trial and applied to state criminal proceedings through the Due Process Clause of the Fourteenth, are also obligatory in state disbarment proceedings. There is abundant authority to suggest that disbarment proceedings which do not meet these standards destroy the integrity of the fact-finding process in such a fundamental way that they cannot survive constitutional attack.

Quite apart from the necessary implications of *Spevack v. Klein*,[72] this Court has long since made it abundantly clear that in a non-criminal administrative setting, confrontation and cross-examination are clear requirements of the Fourteenth Amendment's guarantee of due process of law.[73]

It is not surprising, therefore, that in another traditional non-criminal setting—juvenile court—this Court had little difficulty in finding applicable the full panoply of rights guaranteed in state criminal prosecutions by the Fifth and Sixth Amendments, as absorbed into the Fourteenth. *In re Gault*, 387 U. S. 1 (1967). For "[t]o hold otherwise would be to disregard substance because of the feeble enticement of the 'civil' label-of-convenience which has been attached to juvenile proceedings." [74]

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[72] 385 U.S. 511 (1967). See Argument, *supra* pp. 29-31, in which petitioner urges the logical extension of *Spevack's* Fifth Amendment holding to Fourth Amendment protections. Many of the same considerations apply to his contention that *Spevack* should be extended to compel strict adherence to Sixth Amendment standards as well.

[73] *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959); *In re Oliver*, 333 U.S. 257, 273 (1948). And see *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965). Cf. *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 103-104 (1963).

[74] 387 U.S. 1, 87 S. Ct. 1428, 1455 (1967).

It remains for this Court to read *Spevack v. Klein* and *In re Gault* together and hold that the Sixth Amendment rights to effective counsel, confrontation and cross-examination are applicable to state disbarment proceedings through the Due Process Clause of the Fourteenth.

III.

THE FINDING AGAINST PETITIONER ON A CHARGE OF WHICH HE WAS NEVER NOTIFIED IN ADVANCE OF HEARING AND AGAINST WHICH HE HAD NO OPPORTUNITY TO DEFEND DENIED PETITIONER DUE PROCESS OF LAW.

Lastly, petitioner contends that the finding against him for perjury—a charge which had never been presented to him in advance of the hearing, against which he never had an opportunity to interpose a defense, and of which he learned for the first time in the Report of the Special Referee after the hearing—was a denial of due process of law under the Fourteenth Amendment which independently invalidates the proceedings below.

One of the essential elements of due process of law is the right of an individual to have reasonable notice of a charge against him sufficiently in advance of trial so that he may have an opportunity to adequately prepare a defense. *In re Oliver*, 333 U.S. 257 (1948). And this principle is equally well established in non-criminal administrative proceedings. *Greene v. McElroy*, 360 U.S. 474, 497 (1959). Moreover, where the finding against the accused is that he has given false testimony before the court, such a finding in the absence of a prior charge against him which he had an opportunity to defend, is a denial of due process of law. *In re Oliver, supra.*

Nor need petitioner demonstrate prejudicial error by proving that he would not have been disbarred but for

the perjury finding without prior notice, even though a sound argument may be made on this point.[75] For where unconstitutional procedure has tainted a hearing or trial, the test of reversal is not whether there was sufficient basis to support the result, apart from the constitutionally polluted procedure, but rather, whether there is a *reasonable possibility* that the unconstitutional procedure *might have contributed* to the result. See *Fahy v. Connecticut*, 375 U.S. 85 (1963).

This broad test of reviewability is clearly met in the case at bar. A finding that petitioner had been guilty of perjury at his own disciplinary hearing might well have meant the difference between complete disbarment and less drastic disciplinary action, or none at all.

No charge of any alleged fabrication or perjury had been made in the petition initiating disbarment proceedings or in the Bill of Particulars, nor did the prosecution suggest at the trial or in the disbarment memorandum to the referee that the yellow sheets had been fabricated. In fact, the petitioner had testified about the yellow sheets at the Judicial Inquiry hearings in May and June, 1958, approximately two and a half years prior to his testimony before the Referee. The Referee himself did not suggest any fabrication until he made a finding of fabrication in his report. If petitioner had had notice that there was a question as to the yellow sheets, he could have sought and

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[75] Since the corroboration which the Referee found necessary to establish the third charge of subornation resulted from the fourth finding that petitioner committed perjury himself, it is clear that these two charges, at least, are inextricably intermingled for purposes of this petition. Inasmuch as the crucial findings of the Special Referee (Report, pp. 60-61) indicate that "I should add that if Items 1 and 2 above were alone involved I would recommend that the punishment to be imposed upon [petitioner] be a severe censure," the importance of the fourth adverse finding as affecting petitioner's disbarment is readily apparent.

introduced evidence to support their authenticity. He never had that opportunity.

Interestingly enough, it was this very issue which apparently troubled several members of the Appellate Division[76] considerably in reviewing this case.

This Court has made it clear that adequate notice and opportunity to defend are denied and due process is violated when an accused is found guilty of charges other than those presented to him in advance of trial.[77] If any doubt remained, *In re Gault*[78] disposes of the question of whether denial of timely notice of specific charges in advance of hearing on the merits offends due process:

> "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.' * * * Due process of law requires [written notice to be given at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation]—that is, notice which would be deemed constitutionally adequate in a *civil* or criminal proceeding."[79] (Emphasis added.)

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[76] See confidential memorandum of Christ, J. *in this case*, dated October 6, 1961: "* * * a man should not be disbarred except after a hearing of the charges against him. This respondent [petitioner] is being disbarred for perjury before the Referee, but he has never been so charged with the opportunity to answer and be heard on this issue. I do not believe this should be done." See also confidential memorandum of Pette, J. to the same effect. Both these memoranda were included in the record filed with the Clerk of this Court and are here reprinted at App. C, pp. 60a-62a.

[77] *Cole v. Arkansas*, 333 U.S. 196 (1948), cited with approval in *Spevack v. Klein*, 385 U.S. 511, 518 (1967); and see *Thompson v. Louisville*, 363 U.S. 199 (1960); *DeJong v. Oregon*, 299 U.S. 353, 362 (1937).

[78] 387 U.S. 1 (1967).

[79] *Id.* at ____, 87 S. Ct. 1428, 1446-1447.

It is apparent from the record in the case at bar that petitioner never had any notice whatever of the perjury charge against him until after it was too late to do him any good—he read about it in the Referee's report and conclusions. That a charge so central to the entire disciplinary action against him and so destructive of his entire career and reputation could have been handled by an agent of the State of New York in such cavalier fashion is unthinkable in terms of the high standards of due process to which lawyers as well as other citizens are entitled.

IV.

APPELLANT HAS NEITHER WAIVED NOR ACQUIESCED IN THE VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

It is readily apparent that a valid waiver of rights or consent to search can operate only under circumstances where a conscious, volitional choice, free of duress or official pressure, may be made. *Garrity v. New Jersey*, 385 U.S. 493 (1967). To this end the courts have always been sensitive to the distinction between waiver of constitutional rights and bare submission to authority, *Johnson v. United States*, 333 U.S. 10 (1948); *Amos v. United States*, 255 U.S. 313 (1921), in their effort to "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), quoting in part from *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

For this reason a person under the compulsion of a subpoena cannot be deemed to have given consent to a search. *Nelson v. United States*, 208 F. 2d 505 (D. C. Cir. 1953), *cert. den.* 346 U.S. 827 (1953).

Quite apart from these general considerations, petitioner was placed in an impossible dilemma when he received the broad subpoena *duces tecum* of the Judicial

Inquiry. He knew that the Inquiry was investigating his alleged professional misconduct as part of its general investigatory scheme; he knew that his refusal to cooperate fully with the Judicial Inquiry by fully disclosing all information it sought, might well be grounds for disbarment or discipline for such failure to disgorge. *Re Cohen,* 199 N.Y.S. 2d 658 (1960), affirmed *Cohen v. Hurley,* 366 U.S. 117 (1961); *In re Anastaplo,* 366 U.S. 82 (1961); *Konigsberg v. State Bar of California,* 366 U. S. 36 (1961).

Recognition of the dilemma in which petitioner found himself, and reference to the many occasions in the record in which he sought to assert his constitutional right to protect the private papers which were the subject of the subpoena, lead ineluctably to the conclusion that he neither consented to the search nor waived any of his constitutional rights regarding his private papers by complying with the express and compelling language of the subpoena *duces tecum* served upon him by the Judicial Inquiry.

His vigorous resistance to the retention of his private papers as a further denial of due process and his immediate and continuing objections to the finding of guilt of an offense not charged are matters of record. Moreover, the ruling by the New York Court of Appeals on the merits of the constitutional issues presented—the ruling from which relief is sought here[80]—precludes a determination that such constitutional issues were not adequately preserved below.[81]

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[80] See order of New York Court of Appeals from which relief is sought by this petition reprinted in full at App. B, pp. 59a-60a.

[81] *See Willner v. Committee on Character & Fitness,* 373 U.S. 96, 104 (1963).

CONCLUSION.

The harshness of the penalty of disbarment has been well described by Justice Black, dissenting in *Cohen v. Hurley*, 366 U.S. 117, 146-147 (1961):

> "* * * Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the 'law of the land,' both constitutional and statutory."

When the penalties are so severe, the utmost care must be exercised to see to it that fair procedures have been employed to justify such extreme punishment.

Moreover, the record in this case provides an abundant opportunity for this Court to consider in depth the content of that due process to which lawyers are entitled and upon which they must be permitted to rely as they set about the awesome and challenging tasks this Court has assigned them in a society in flux.

Petitioner has pointed out a number of areas in which his rights as a private citizen were emasculated in the disciplinary proceedings which resulted in his permanent disbarment from the practice of law in the State of New York. The zeal of the administrative and judiciary personnel of the State of New York to protect the public against unprofessional conduct of lawyers is highly commendable. But they must, in the process, understand that:

"A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms to obtain that goal." *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957).

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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